July 25, 2007

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Terry M. Apodaca

Date of Filing: May 7, 2007

Case Number: TFA-0204

This Decision concerns an Appeal that was filed by Terry M. Apodaca in response to a determination that was issued to her by the Director of the Department of Energy's (DOE) Headquarters Policy and Internal Controls Management office (hereinafter referred to as "the Director"). In that determination, the Director replied to a request for documents that Ms. Apodaca submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Director released certain documents to Ms. Apodaca in their entirety, but withheld other documents. This Appeal, if granted, would require that the Director release the withheld information, and respond to portions of Ms. Apodaca's request that she claims were not addressed in the determination.

The FOIA generally requires that documents held by federal agencies be released to the public on request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information that agencies are not required to release. 5 U.S.C. § 552(b)(1)-(9); *see also* 10 C.F.R. § 1004.10(b)(1)-(9).

I. BACKGROUND

In her FOIA request, Ms. Apodaca sought access to Position Descriptions, lists of job duties, training records, Performance Appraisal performance objectives and performance award amounts pertaining to certain specified DOE employees, all documents pertaining to Ms. Apodaca's work performance during FY 2006, and all documents pertaining to "the Six Sigma review of the FOIA/PA programs" and to the "Violence-in-Workplace incident that occurred in OPA last May 2006." *See* Ms Apodaca's February 12, 2007 request at 2.

In his response, the Director released the position descriptions, eight of the nine requested Performance Appraisal performance objectives with social security numbers and ratings deleted, training records, e-mails concerning the "Six Sigma Review of the FOIA and Privacy Act programs," and a copy of a Threat Incident Form pertaining to the "Violence-In-Workplace"

incident. The Director withheld the performance award amounts and social security numbers under FOIA Exemption 6.

In her Appeal, Ms. Apodaca challenges the Director's application of Exemption 6 and claims that the determination did not address her request for lists of job duties or for performance award amounts granted to Office of Public Affairs employees during the last five years. She also contends that the Threat Incident Form provided to her had been improperly altered, that she was not provided a "copy of [Person #1]'s (the aggressor) nor [Person #2]'s (the witness) statements" concerning the Violence-In-Workplace incident, and that she was not given any documents describing any disciplinary action taken against [Person #1]. Appeal at 2.

II. ANALYSIS

Exemption 6 of the FOIA protects from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co*., 456 U.S. 595, 599 (1982) (*Washington Post*).

In her Appeal, Ms. Apodaca argues that the salaries of federal employees are not exempt from mandatory release under the FOIA, and that the amounts of performance awards should similarly be released. As support for this position, she cites 5 C.F.R. § 293.311, which provides that "Present and past annual salary rates (including performance awards or bonuses, incentive awards, merit pay amount, . . . ," are to be made available to the public. 5 U.S.C. § 293.311(a)(4). In his determination, the Director found that the employees' performance ratings were protected from mandatory disclosure pursuant to Exemption 6 because their release would constitute a clearly unwarranted invasion of the employees' personal privacy, and that releasing the amounts of their performance awards would, in effect, release the employees' performance ratings. In order to determine whether the Director properly applied Exemption 6, we must first consider the validity of these findings.

In determining whether the performance ratings may be withheld under Exemption 6, we must undertake a three-step analysis. First, we must determine whether a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the ratings may not be withheld pursuant to Exemption 6. *Ripskis v. Department of Housing and Urban Development*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, we must determine whether release of the information would further the public interest by shedding light on the operations and activities of the Government. *See Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989) (*Reporters Committee*). Third, we must balance the identified privacy interests against the public interest in order to determine whether release of the information would constitute a clearly unwarranted invasion of personal privacy under Exemption 6. *See generally Ripskis*, 746 F.2d at 3.

We find that substantial privacy interests would be implicated by the release of the employees' performance ratings. The humiliation of an employee that could result from the release of mediocre

or poor ratings is apparent. However, the release of even favorable ratings can cause embarrassment, as well as jealousy and possible harassment from employees who receive lesser ratings. On the other hand, release of the ratings would further the public interest to some extent by shedding light on the way in which the government evaluates its employees. We believe that this interest is outweighed, though, by the deleterious effects that disclosure could have on employee morale and workplace efficiency. As the District of Columbia Circuit Court of Appeals stated in *Ripskis*, "Disclosure will be likely to spur unhealthy comparisons among . . . employees and thus breed discord in the workplace," and "chill candor in the evaluation process as well." 746 F.2d at 3. In that case, the Court upheld the decision of a lower court that the names of employees were properly redacted under Exemption 6 from personnel evaluation forms provided to a requester. We find that the Director properly determined that the personnel ratings are exempt from mandatory disclosure pursuant to Exemption 6.

Next, we must determine whether the Director correctly found that release of the performance bonuses would, in effect, release the ratings. In making this determination, we contacted the NNSA Service Center at which the employees in question work. We were informed that the performance appraisal system used ties the amount of awards directly to performance appraisals. For example, if an employee was given an award equal to 6 percent of that employee's salary, it would indicate a rating of "Significantly Exceeds Expectations."If the employee received a 3 percent award, that would mean that a rating of "Fully Meets Expectations" had been given. According to the Service Center, it had no discretion as to the amount of the award, given a particular employee's rating. *See* June 4, 2007 e-mail from Ron O'Dowd, NNSA Albuquerque Service Center, to Robert Palmer, OHA Staff Attorney. Given these facts, and the general availability of federal salary information, it is apparent that release of the award amounts would be tantamount to releasing the performance ratings.

Contrary to Ms. Apodaca's position, 5 C.F.R. § 293.311 does not mandate the release of the award amounts. That regulation provides, in pertinent part, that the DOE "will generally not disclose" salary, performance award or other similar information when that information

> Is selected in such a way that would reveal more about the employee on whom information is sought than [that employee's name and present and past position titles and descriptions, performance standards, grades, salaries and duty stations], the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

5 C.F.R. § 293.311(b)(1). In this case, the disclosure of the performance award amounts would also reveal the employees' performance ratings, which would constitute a clearly unwarranted invasion of their personal privacy. The Director properly concluded that the performance award amounts should be withheld under Exemption 6. *See, e.g., Robert J. Ylimaki,* 28 DOE ¶ 80,154 (March 23,

2001) (Case No. VFA-0651). (All OHA decisions issued after November 19, 1996 may be accessed at http://www.oha.doe.gov/foia1.asp) [1]

As previously stated, Ms. Apodaca also challenged the adequacy of the Director's response to her FOIA request. Specifically, she alleges that the determination letter did not address her requests for performance award amounts for Office of Public Affairs employees for the last five years and for lists of job duties, that a document provided to her had been "falsified," and that three documents that she should have received were not provided to her.

Contrary to her allegations, the Director's response did address Ms. Apodaca's requests for "all performance award amounts granted to any Office of Public Affairs employee for the last five years" (Item 7 of the FOIA request), and for lists of job duties. On page two of the determination letter, the Director stated that "In reference to Item 7, the requested amounts are withheld in their entirety pursuant to Exemption 6 of the FOIA as described above." The job duties "are detailed in the specific Position Descriptions [Ms. Apodaca] requested and received. Since the job duties were provided, they were not mentioned in the determination letter since she was given what she requested without redaction." June 4, 2007 e-mail from Mr. O'Dowd to Mr. Palmer.

Ms. Apodaca's claim that she was provided a "falsified" document is based upon the fact that the document differs from one that she provided to NNSA personnel. This document pertains to an incident that occurred involving Ms. Apodaca and [Person #1], which was witnessed by a third NNSA employee. As part of an investigation of this incident, the three employees were asked to submit written statements setting forth their versions of the events that transpired. Ms. Apodaca's statement, which was submitted as a "Threat Incident Form," is apparently one of the documents that she was expecting to receive in response to her request for "all documentation concerning" the incident in question. FOIA Request at 2. However, upon receiving statements from Ms. Apodaca, [Person #1] and the witness, the Manager of the Office of Public Affairs reviewed them and combined them into a single form for submission to Employee Relations. It is this combined form that was provided to Ms. Apodaca. *Id.* We were further informed that the individual statements, which included two documents requested by Ms. Apodaca, were then destroyed, and that the Threat Incident Form was not falsified, but is a true copy of the Form currently on file with the NNSA.

Finally, Ms. Apodaca contends that she was not provided with certain documents responsive to her request. As stated above, two of the documents Ms. Apodaca contends she should have been

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1/ Ms. Apodaca requests, in the alternative, that she be provided with a listing of the performance awards granted by a named individual for the last three years, without the names of the employees to whom the awards were granted. However, there is no indication that such a document currently exists, and the FOIA does not require that documents be created to satisfy a request. 10 C.F.R. § 1004.4(d)(1). Moreover, we have been informed that, given the limited number of employees in question and the fact that each has a publicly available salary that differs from the others in the group, it would not be difficult to attribute a particular award amount to a particular employee. *See* June 29, 2007 e-mail from Mr. O'Dowd to Mr. Palmer.

provided were the statements made by [Person #1] and [Person #2] concerning the incident between Ms. Apodaca and [Person #1]. In addition, Ms. Apodaca requested, but did not receive, any documents describing any disciplinary action taken against [Person #1]. In effect, she is challenging the adequacy of the search that was conducted.

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (December 13, 1995) (Case No. VFA-0098). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord, Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). The fact that the results of a search do not meet the requester's expectations does not necessarily mean that the search was inadequate. Instead, in evaluating the adequacy of a search, our inquiry generally focuses on the scope of the search that was performed. *Information Focus On Energy*, 26 DOE ¶ 80,240 (December 19, 1997) (Case No. VFA-0353).

During our communications with the NNSA Service Center, we were informed that Ms. Apodaca's request was referred to the Manager of the Office of Public Affairs and to the human resources office, where the relevant files were searched. As explained above, [Person #1]'s and [Person #2]'s statements do not exist because they were destroyed, along with Ms. Apodaca's, after the Office of Public Affairs combined their contents into a single document for submission to Employee Relations. Regarding any evidence of disciplinary action taken against [Person #1], the Office of Public Affairs has stated that no documentation exists other than a notation on the Threat Incident Form already provided to Ms. Apodaca. Based on this information, we find that the search was reasonably calculated to uncover the sought materials, and was therefore adequate. [2]

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Terry Apodaca, OHA Case Number TFA-0204, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district

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2/ Although it is not relevant to our evaluation of the search that was performed, we note that had any documents pertaining to any disciplinary action taken against [Person #1] been located, it is possible, if not likely, that such documents would have been withheld in whole or in part under Exemption 6.

in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: July 25, 2007